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JAKS RESOURCES BHD
v. STAR MEDIA GROUP BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIZAH NAWAWI JCA
B SUPANG LIAN JCA
[CIVIL APPEAL NOS: W-02(IM)(NCVC)-1122-08-2020,
W-02(IM)(NCVC)-1188-09-2020 & W-02(IM)(NCVC)-1435-10-2020]
31 JULY 2023

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Abstract – *The findings of fact made in an interim application are not binding on the parties when they proceed to arbitration or litigation. Although the parties may generally not resile from the positions they have taken at an interlocutory stage, they are not prevented from fully arguing their case on the merits at the arbitration or trial. Where there is a conflict of affidavit evidence, the courts will generally refrain from making any findings that are not necessary to decide the interim measure that is being sought.*

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CIVIL PROCEDURE: *Trial – Findings – Findings by High Court – Findings of High Court Judge in construction contract in originating summons to restrain call on bankers' guarantee – Whether binding on subsequent judge hearing underlying dispute in another suit – Whether findings of fact derived from affidavits in interlocutory application that were in conflict were final and conclusive of rights of parties to be ventilated at trial of underlying disputes – Whether issue of extended completion date could be argued more fully at trial of underlying disputes – Whether res judicata applied*

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CIVIL PROCEDURE: *Striking out – Application for – Construction contract – Disputes arising from sale and purchase agreements – Dispute as to completion date – Application to strike out suits – Whether there were multifarious disputes of facts arising from construction contract between parties – Whether application under O. 14A of Rules of Court 2012 eminently suitable to dispose of suits – Whether suits ought to proceed to trial*

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There were three related appeals. The disputes that led to the appeals could be traced to a sale and purchase agreement ('SPA') entered into by Jaks Island Circle Sdn Bhd ('JIC') and Star Media Group Bhd ('Star Media') as part of a joint development between the parties for JIC to build a mixed residential and commercial development on Star Media's land. Under the SPA: (i) JIC was to procure a banker's guarantee ('BG') for RM50 million which JIC did from Ambank (M) Bhd and United Overseas Bank (Malaysia) Bhd in the sum of RM25 million each; and (ii) the completion date of the

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development was three years from the date the agreed building plans were approved excluding extension of time, if any. The initial date was 15 August 2015. However, in the course of construction, Star Media requested for various variations. Jaks Resources Bhd ('JRB') and JIC took the position that the completion date was varied by parties to 20 June 2020, *ie*, pursuant to the three years' completion period from the date of approval of the amended building plans. On February 2018, Star Media called on the BGs as it took the view that JIC failed to deliver the vendor's entitlement by the completion date. A dispute arose between the parties as to the actual completion date of the development. JIC initiated arbitration under SPA but Star Media, at that material time, failed and refused to proceed with the arbitration. Star Media sued JRB for (i) specific performance of the transfer of the title to the land; and (ii) damages arising out of the delay in completion after calling on the total sum of RM50 million duly paid by the respective banks to Star Media under the two BGs ('Suit 258'). JRB counterclaimed against Star Media for damages for the tort of maliciously injuring the business and reputation of JRB for what it claimed was a wrongful breach of contract on the part of Star Media. In another suit, JRB and JIC sued Star Media for damages for breach of contract under the SPA and that Star Media had unjustly enriched itself at the expense of JRB and JIC. Star Media (i) applied to strike out Suit 258 and Suit 374 under O. 14A of the Rules of Court 2012 ('O. 14A application'); (ii) sought to strike out various paragraphs of JRB's defence and counterclaim under O. 18 r. 19(1)(b), (c) and/or (d) in Suit 258; (iii) sought for specific performance of the corporate guarantee of JRB under O. 81 of the ROC; and (iv) sought to strike out JRB and JIC's claims in Suit 374 under O. 18 r. 19(1)(b), (c) and/or (d) of the ROC. The High Court (before Wong Chee Lin J) allowed Star Media's O. 14A application in Suit 258. As the application was not a stand-alone O. 14A application but also an O. 18 r. 19 and O. 81 of the ROC applications all rolled into one application, the various paragraphs of JRB's defence and counterclaim were also struck out. However, the High Court (before Akhtar Tahir J) dismissed Star Media's O. 14A application in Suit 374. Hence, the present appeals. Both Star Media ('Appeals 1188 and 1453'), on the one hand and JRB and JIC ('Appeal 1122'), on the other filed their respective appeals. JRB argued that the finding of the extended completion date was *res judicata* in that it had been decided determinatively by the High Court before Nordin Hassan J (as he then was) when His Lordship heard two originating summonses ('OS 11 and OS 12'). The issues that arose were: (i) whether the finding of a judge hearing an interlocutory application to restrain call on a BG was binding on a subsequent judge hearing the underlying dispute in another suit; and (ii) whether there were multifarious disputes of facts arising from a construction contract between the parties in the SPA such that an O. 14A application was eminently unsuitable to dispose of the two suits.

A B C D E F G H I

A **Held (allowing Appeal 1122; dismissing Appeals 1188 and 1453)**
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The High Court limited intervention was only for the limited interim measure of granting an injunction to restrain the call on the BG if unconscionability on the part of the caller, in this case Star Media, had been shown. As the High Court in OS 11 and OS 12 had not so found, no interim injunction was granted and the originating summonses were dismissed. The High Court, in determining OS 11 and OS 12, was not required to determine the merits of underlying dispute between parties. A finding by the High Court on why it was inclined to hold that the extended completion date was 15 February 2018 did not bind the High Court that would decide ultimately on the full merits of the parties' claim and counterclaim in the underlying disputes. (paras 47, 52 & 58)

(2) The finding that the extended completion date was on 15 February 2018 and as such the call on the BG was not premature or not unconscionable was at best only a tentative finding for the limited purpose of deciding whether the call on the BG by Star Media was unconscionable. For *res judicata* to be applicable, there must be finality to the decision on the issue in question. Given the interim and/or interlocutory nature of OS 11 and OS 12, there could hardly be any finality attached to the issue of completion date. The views expressed by Nordin Hassan J were based on affidavit evidence alone which were in conflict in material aspects. In an interlocutory application, findings of fact derived from affidavits that were in conflict were not final and conclusive of the rights of the parties to be ventilated at the trial. A closer perusal of the grounds of judgment of Nordin Hassan J would show that His Lordship confined his finding solely in respect of the issues concerning calling of the BGs. It was open for JRB/JIC to argue the issue of extended completion date more fully at the trial of the underlying disputes. (paras 59-61 & 63)

(3) Question (i) was answered in the negative in that JRB was not barred by reason of *res judicata* and/or issue estoppel from contending that the completion date for the vendor's entitlement under the SPA had been enlarged to 20 June 2020 in spite of the High Court in OS 11 and OS 12, when hearing the injunction application by JIC to restrain Star Media's call in the BGs, had made a finding of fact that the completion date fell due on 15 February 2018. (para 81)

(4) The more the court scrutinised the issues and questions raised together with the facts vigorously contested, the more the court was satisfied that the two suits must proceed to trial and could not be summarily disposed of by way of O. 14A of the ROC. Both the matters were remitted back to the respective High Courts for trial. As the issues straddled each other in the two different suits, the parties were enjoined to apply at the appropriate time, for the two suits to be heard together. As parties had

by consent, agreed for the suit before Akhtar Tahir J to be transferred to Mohd Nazlan Ghazali J (as he then was), the court accordingly directed so. (para 132)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Arnold v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***

Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd [2015] 5 CLJ 652 HC ***(refd)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 HC ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***

Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd [2016] 1 LNS 649 HC ***(refd)***

Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals [2003] 4 CLJ 505 CA ***(refd)***

Florence Bailes v. Dr Ng Jit Leong [1983] 1 LNS 7 HC ***(refd)***

Global Indian Education Sdn Bhd v. Neeta's Herbal International Sdn Bhd [2016] 1 LNS 822 CA ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Joseph Lynch Land Co Ltd v. Lynch [1995] 1 NZLR 37 ***(refd)***

Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC ***(refd)***

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***

Malaysian Airline System Bhd v. Competition Commission & Another Appeal [2022] 1 CLJ 856 CA ***(refd)***

Malaysian Resources Corporation Bhd v. HSBC Bank Malaysia Bhd & Ors And Another Suit [2019] 1 LNS 1158 HC ***(refd)***

Pamol (Sabah) Ltd & Anor v. Joseph Paulus Lantip & Ors [2012] 1 LNS 466 CA ***(refd)***

Su'ot Tebari v. Land Custody And Development Authority (LCDA) & Another Appeal [2020] 10 CLJ 807 CA ***(refd)***

Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

TTI Team Telecom International Ltd And Another v. Hutchinson 3G UK Ltd [2003] All ER (D) 83 (Apr) ***(refd)***

WRP Asia Pacific Sdn Bhd & Anor v. Tael Tijari Partners Ltd & Ors [2018] 1 LNS 1073 HC ***(refd)***

Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd and Anor [1975] AC 581 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 11, 50
Rules of Court 2012, O. 14A r. 1, O. 18 r. 19(1)(b), (c), (d), O. 81
Street, Drainage and Building Act 1974, s. 70(21)

Other source(s) referred to:
Spencer Bower, Turner and Handley: The Doctrine of Res Judicata, Butterworth, 3rd edn 1996, para 201

(Civil Appeal No: W-02(IM)(NCVC)-1122-08-2020)
For the appellant - Gopal Sri Ram, Wong Rhen Yen, Emily Wong Li Yan & Marcus Lee Min Lun; M/s Dennis Nick & Wong
For the respondent - Wong Guo Bin, Sophia Hoo Tsin Ai, Tharminder Singh & Daryl Kirk; M/s Izral Partnership

(Civil Appeal No: W-02(IM)(NCVC)-1188-09-2020)
For the appellant - Wong Guo Bin, Sophia Hoo Tsin Ai, Tharminder Singh & Daryl Kirk; M/s Izral Partnership
For the respondent - Gopal Sri Ram, Wong Rhen Yen, Emily Wong Li Yan & Marcus Lee Min Lun; M/s Dennis Nick & Wong

(Civil Appeal No: W-02(IM)(NCVC)-1435-10-2020)
For the appellant - Wong Guo Bin, Sophia Hoo Tsin Ai, Tharminder Singh & Daryl Kirk; M/s Izral Partnership
For the respondent - Gopal Sri Ram, Wong Rhen Yen, Emily Wong Li Yan & Marcus Lee Min Lun; M/s Dennis Nick & Wong

[Editor's note: For the High Court judgment, please see Star Media Group Bhd v. Jaks Resources Bhd [2020] 1 LNS 1436 (overruled in part).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] The key issue in these three related appeals hovers around whether a finding of the learned High Court Judge with respect to the extended completion date in a construction contract in an originating summons taken out to restrain the call on a banker's guarantee ("BG") is binding on the parties and its privies in the underlying construction disputes between them. The underlying disputes before the High Court are in two separate suits where the parties have claims and a counterclaim in one of them.

[2] Related to the above issue is whether the parties' disputes are amenable to a disposal by way of an application under O. 14A of the Rules of Court 2012 ("ROC"). One learned judge in a suit before her thought so as substantially all issues arising from the construction dispute would be resolved by reference to the extended completion date as decided by a previous High Court Judge when hearing the originating summons and dismissing it and thus, dismissing the injunction to restrain the call on the BGs.

[3] Another learned High Court Judge before whom another related suit was filed apparently did not think so as there are multiple issues of fact and law that would require a trial to unravel. A

[4] The genesis of the disputes between the parties can be traced to a sale and purchase agreement ("SPA") entered into on 19 August 2011 by Jaks Island Circle Sdn Bhd ("JIC") with Star Media Group Bhd ("Star Media") as part of a joint development between the parties for JIC to build a mixed residential and commercial development on Star Media's land. Based on the agreed terms, Star Media agreed to sell a piece of land located in Petaling Jaya, Selangor ("the said land") to JIC for RM135 million. JIC paid RM500,000 to Star Media as deposit and part payment for the said land. The balance purchase price of RM134.5 million was agreed to be paid by way of JIC delivering the "vendor's entitlement" to Star Media *in lieu* of monies. See: SPA cl. 4.1 at p. 15 appellant's core bundle of documents ("ACB(D)"). B C

[5] The vendor's entitlement is defined in the SPA as the delivery of vacant possession, issued document of title and certificate of completion and compliance of tower A and the right of Star Media to rent certain number of car park bays from JIC. See: SPA cl. 1.1 at p. 12 ACB(D). D

[6] It was a term of the SPA that JIC was also to procure a BG for RM50 million which JIC did from Ambank (M) Berhad ("Ambank") and United Overseas Bank (Malaysia) Berhad ("UOB") in the sum of RM25 million each, both in favour of Star Media which JIC did on 8 November 2013. See: BGs dated 8 November 2013 at pp. 118 to 130 ACB(D). E

[7] The ultimate holding company of JIC, *ie*, Jaks Resources Berhad ("JRB") was required and agreed to guarantee Star Media the performance of JIC's contractual obligations under the SPA through a corporate guarantee dated 17 October 2013. See: corporate guarantee dated 17 October 2013 at p. 131 ACB(D). F

[8] The completion date of the development as provided in cl. 4.1 read with cl. 1.1 is three years from the date the agreed building plans were approved excluding extension of time, if any. The initial date is 15 August 2015 ("original completion date") as Majlis Bandaraya Petaling Jaya ("MBPJ") had approved the building plans on 16 August 2012. G

[9] However, in the course of construction, it was alleged that Star Media requested for various variations to Tower A. Star Media's requests to vary the agreed building plan were made during project committee meetings between parties. This can also be shown by various correspondence issued by Star Media. See: minutes of meeting and correspondence at pp. 133 to 208 ACB(D). Left with no choice, the new building plan agreed by parties had to be approved by the relevant authorities to comply with the relevant laws. H I

A **[10]** Eventually, the approval for the newly varied and amended building plans were granted by the authorities. As such, JRB and JIC took the position that the completion date for Tower A was varied by parties to 20 June 2020 (pursuant to the three years' completion period from the date of approval of the amended building plans).

B **[11]** On 15 February 2018, Star Media called on the BGs. See: notices of demand dated 15 February 2018 at pp. 213 to 216 ACB(D). It took the view that JIC had failed to deliver the vendor's entitlement by the completion date which fell on 15 February 2018, after five extensions that it agreed to give to JIC. A dispute has therefore arisen between parties as to the actual C completion date of the development after what was alleged as Star Media's multiple requests for variation of building plan resulting in a new approved plans by MBPJ.

[12] JRB and JIC took the stand that these various extensions were for valid reasons and chiefly due to the various variations ordered by Star Media D and these extended completion dates were targeted dates and that legally JIC had a full three years from the last date of approval of the new approved plans which amendments were at the behest of Star Media.

[13] In order to resolve that dispute, JIC therefore initiated arbitration E under cl. 19.1 of the SPA (the arbitration agreement) through a notice of arbitration dated 6 March 2018. Star Media at that material time had failed and refused to proceed with the arbitration on ground that the pre-arbitration dispute resolution procedure had not been complied with.

[14] Star Media had sued JRB in KLHC Suit No. WA-22NCvC-258-04/2019 F ("Suit 258") for specific performance of the transfer of title to a piece of land on which an office tower block called Tower A which should have been completed and delivered to it by JIC and for which its holding company JRB had given a corporate guarantee for the due performance of the contract and an indemnity for damages. Star Media had also sued for damages arising out of the delay in completion after calling on the total sum of RM50 million G duly paid by the respective banks to Star Media under the two BGs.

[15] Star Media in its statement of claim dated 19 April 2019 running into 51 paragraphs spanning 25 pages pleaded JIC's breaches of its SPA's obligations and its failure to deliver Star Media's entitlement which is the H vendor's entitlement by the completion date or extended completion date as the case may be. It also pleaded JIC causing construction defects to various parts of Tower A and JIC's failure to remedy the defects in the construction work. See Star Media's statement of claim dated 19 April 2019 at p. 130 appellant's core bundle of pleadings "ACB (P)".

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[16] Star Media further concluded at para. 48 of its statement of claim as follows:

Conclusion

> 48. Given the above, the Plaintiff contends that at all material times, the Defendant lacked intention and/or took no initiative to complete or caused to be completed JIC's obligations under the SPA, which are *inter alia* to complete and deliver vendor's entitlement within the Completion Period or such extended Period agreed to by the Plaintiff as well as to remedy all existing defects in Tower A before its handover to the Plaintiff.

[17] Star Media by its own statement of claim in para. 36(b) had pleaded that Tower A was more than 95% completed at the point when Star Media called on the two BGs of RM50 million.

[18] JRB denied all of Star Media's allegations and in answer thereto pleaded that JIC did not breach its SPA's obligations. It further pleaded that Star Media had by its conduct, expressly and/or impliedly agreed to submit a newly varied building plans for the authority's approval and correspondingly the completion date would run from the date of the new approved building plans. It denied that JIC had caused construction defects to Tower A and that in any event, Star Media's claims are premature as the completion date would be 20 June 2020, which is three years after the approval of the amendments to the building plan by MBPJ on 20 June 2017.

[19] JRB counterclaimed against Star Media for damages for the tort of maliciously injuring the business and reputation of JRB for what it claimed is a wrongful breach of contract on the part of Star Media when the completion date of Tower A that JIC had contracted to build for Star Media was only on 20 June 2020 and not on 15 February 2018 as claimed by Star Media because of various variations to drawings which required a fresh submission to the MPPJ for approval and approval was only obtained on 20 June 2017. See JRB's defence and counterclaim dated 6 August 2019 at pp. 134 to 186 ACB(P).

[20] In a second suit, KLHC Suit No. WA-22NCvC-374-05/2019 ("Suit 374"), JRB and JIC had sued Star Media for damages for breach of contract under the SPA through its various conducts and that Star Media had unjustly enriched itself at the expense of JRB and JIC. It was also pleaded that Star Media had to elect between calling on the BGs or sue for damages for late delivery as provided for in the SPA but not both. Star Media denied all the claims of JRB and JIC in its defence. See JRB and JIC's statement of claim dated 30 May 2019 at pp. 232 to 292 ACB(P) and Star Media's defence dated 5 July 2019 at pp. 293 to 319 ACB(P).

[21] In spite of the fact that there are numerous allegations and counter-allegations against each other, Star Media was undaunted and it took out an O. 14A application for both Suit 258 and Suit 374. Star Media also sought

to strike out various paragraphs of JRB's defence and counterclaim under O. 18 r. 19(1)(b), (c) and/or (d) of the ROC in Suit 258. It also sought under O. 81 of the ROC for specific performance of the corporate guarantee of JRB. Meanwhile in Suit 374, it sought to strike out JRB and JIC's claims under O. 18 r. 19(1)(b), (c) and/or (d) of the ROC and/or the inherent jurisdiction of the High Court.

At The High Court

[22] The High Court in Suit 258 allowed Star Media's O. 14A application and Justice Wong Chee Lin J ("Justice CL Wong") on 7 August 2020 substantially disposed of the suit in favour of Star Media. The application was not a stand-alone O. 14A application but also an O. 18 r. 19 and O. 81 of the ROC applications all rolled into one application.

[23] In the result, the various paragraphs of JRB's defence and counterclaim were also struck out. The whole decision seemed to have been hinged on Justice CL Wong's finding that the extended completion date was on 15 February 2018 and as such there was nothing to proceed to trial and that Star Media should be allowed substantially its claim.

[24] Justice CL Wong's decision may be distilled at para. 68 of her grounds of judgment ("GOJ") at p. 132 appellant's core bundle of judgments "ACB (J)" as follows:

> 68. As I have substantially ruled in favour of Star Media and especially in view of my ruling that JRB is precluded from disputing that the extended completion date was on 15 February 2018, JRB has no defence or sustainable counterclaim against Star Media. I will order the relevant paragraphs of the defence and counterclaim struck out as a consequence of the orders made on the Order 14 A application. I will also grant Star Media the specific relief it has sought except that I will not transfer the Issue Document of Title of Tower A to Star Media by a specific date but I will order contractual interest in favour of Star Media to be paid until the date of transfer of the Issue Document of Title to Tower A to Star Media. The interest is something agreed to by the parties in the SPA.

[25] On the other hand in Suit 374, Justice Akhtar Tahir J dismissed Star Media's O. 14A application and His Lordship held that the parties' pleadings clearly show that there are material disputed facts unsuited to be determined summarily under O. 14A of the ROC. His Lordship viewed that those material disputed facts can only be determined by a full trial. See the High Court GOJ in Suit 374 at pp. 134 to 142 ACB(J).

[26] Both Star Media, on the one hand, and JRB and JIC filed their respective appeals to the Court of Appeal. JRB appealed against the whole of Justice CL Wong's decision in Suit 258 *vide* Appeal 1122 in the Court of Appeal. Star Media, on the other hand, appealed against part of the decision in Suit 258 *vide* Appeal 1188 before the Court of Appeal and the whole of the decision of Justice Akhtar Tahir J in Suit 374 *vide* Appeal 1435 in the Court of Appeal.

Before The Court Of Appeal

[27] JRB argued before us in Appeal 1122 that as there are various disputes of facts not suitable for determination and disposal *via* an O. 14A application in Suit 258, the learned judge had erred in deciding the matter summarily, inspired no doubt by her erroneous view that the finding of the extended completion date was *res judicata* in that it had been decided determinatively by the High Court by Justice Nordin Hassan J (now FCJ) when His Lordship heard the two originating summonses. JIC had filed the two originating summonses against Star Media together with AmBank as a nominal defendant, *vide* Originating Summons No: WA-24C(ARB)-11-02/2018) and UOB as another nominal defendant (*vide* Originating Summons No: WA-24-C(ARB)-12-02/2018) ("OS 11 and OS 12") respectively. The injunction applications to restrain Star Media from calling on the two BGs in OS 11 and OS 12 were dismissed.

[28] It was further argued by JRB that there were live issues with respect to whether the extended completion date has to be three years from the date of the new approved plans in the light of the numerous variations instructed by Star Media. There was also the dispute on whether Star Media must elect whether to limit its claim for damages for delay to that of RM50 million as represented in the two BGs and as referred to in cl. 8.1 of the SPA and whether JIC had failed to rectify defects in the construction of Tower A and further whether JIC had failed to build according to the agreed specifications in the drawings and building plans.

[29] JRB argued that had the matter proceeded to arbitration then the underlying contract and the issues arising out of it would be fully and finally resolved before a panel of three arbitrators.

[30] JRB also argued that the fact that the notice of arbitration was objected to by Star Media on the ground that pre-arbitration process of dispute resolution had not been complied with and that both sides by filing their respective suits in the High Court would have taken to have abandoned arbitration for litigation in the High Court. However, that does not mean that the underlying disputes between the parties had vanished into thin air and somehow disappeared.

[31] JRB further contended that the disputes are very much alive and that the findings of the High Court in OS 11 and OS 12 with respect to the fact that there was nothing unconscionable in Star Media calling on the BGs presumably on the High Court having found that the extended completion date was 15 February 2018, cannot preclude the High Court hearing the underlying dispute from revisiting the issue in the light of the evidence to be adduced at the trial where all the relevant facts would be before the High Court in Suit 258.

[32] It was submitted with considerable persuasion that any finding of fact that are not strictly necessary for the finding of no unconscionable conduct on the part of Star Media to call on the BG, would be *obiter* and not binding on the High Court hearing the underlying dispute between the parties.

[33] Thus, where the High Court only needed to hold that a genuine dispute on what is the correct extended completion date had arisen and that taken at its highest, that cannot amount to unconscionable conduct, any further finding not necessary for determining the issue of unconscionable conduct, cannot be binding on the High Court that is tasked to decide the underlying disputes and the consequences that follow.

[34] Star Media, on the other hand, contended that as JIC had argued and failed before the High Court in the two originating summons to restrain the call on the BGs and further had failed in its appeal to the Court of Appeal and then failing to obtain leave from the Federal Court to appeal further, the issue of the extended completion date must be held to have been affirmed by the Court of Appeal and the Federal Court such that the issue is caught by *res judicata* in that it cannot be opened for re-argument at the trial.

[35] Star Media therefore argued that the full reliefs should have been granted to it by the High Court in Suit 258 and as for Suit 374, the High Court should have correspondingly allowed Star Media's application to have both JRB and JIC's statement of claim struck out.

Whether The Finding Of A Judge Hearing An Interlocutory Application To Restrain Call On A BG Is Binding On A Subsequent Judge Hearing The Underlying Dispute In Another Suit

[36] Question 1 posed for the High Court's determination in the O. 14A application was this:

> Whether the defendant is barred by reason of *res judicata* and/or issue estoppel from contending that the completion date for the vendor's entitlement under the SPA has been enlarged to 20 June 2020 ("Alleged New completion date") given that the High Court in OS 11 and OS 12 had already determined that the completion date fell due on 15 February 2018.

[37] In answering the question posed, the High Court had referred to a cluster of cases setting out the scope of application of *res judicata* and its rationale. The high authorities that expounded this principle are the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, the Privy Council case of *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd and Anor* [1975] AC 581 and the Court of Appeal case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57.

[38] In *Asia Commercial Finance*'s case (*supra*), Justice Peh Swee Chin FCJ explained the doctrine of *res judicata* as follows, at p. 791 (CLJ); p. 197 (MLJ): A

> What is *res judicata*? It simply means a matter adjudged, and its significance lie in its effect creating an estoppel per *rem judicature*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted again to litigate once more the *res judicata*, because the judgment becomes the truth between them, or in other words, the parties should accept it as the truth, *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed for the same cause of action. B C

[39] Though the parties in this suit are JRB and Star Media whereas the parties in the OS 11 and OS 12 are JIC and Star Media, the learned High Court Judge had referred to the High Court case of *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351; [1993] 3 MLJ 713 and the Court of Appeal case of *Pamol (Sabah) Ltd & Anor v. Joseph Paulus Lantip & Ors* [2012] 1 LNS 466; [2012] 5 MLJ 616 for the proposition that the parties need not be the same as long as there was a privity of interest between the parties in both the actions. Here, JRB is the ultimate holding company of JIC and had executed a corporate guarantee in favour of Star Media to guarantee the full, prompt and complete performance by JIC for its obligations under the SPA including the delivery of the vendor's entitlement. D E

[40] JRB, being a listed company with Bursa Malaysia, had made the relevant public announcements to Bursa Malaysia on 19 February 2018 when Star Media had called on the BGs as well as the issuance of a press release dated 21 February 2018 when the OS 11 and OS 12 were filed. F

[41] Further, JRB was also relying on exactly the same contentions of the alleged new completion date and alleged variations raised by JIC and determined by the High Court in OS 11 and OS 12 and it was prevailed upon the High Court that it would be an abuse of the court's process for the same issue to be re-litigated again. G

[42] The finding of fact on the extended completion date had arisen in the High Court's adjudication of OS 11 and OS 12. These originating summonses proceedings were filed under s. 11 of the Arbitration Act 2005 ("AA"), seeking to restrain Star Media from calling on the BGs pending the disposal of the arbitration proceedings. As settled by case law JIC would have to show unconscionability on the part of Star Media calling on the BG. See the OS 11 and OS 12 at pp. 5 to 8 and pp. 9 to 12 of JRB's core bundle of pleadings ("ACB(P)"). H I

[43] As there is an agreement to arbitrate, the court's intervention to assist any parties would be circumscribed by s. 8 which provides as follows:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[44] Section 11 AA provides for some interim measures pending a reference to arbitration. It reads:

> 11. Arbitration Agreement and Interim Measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> [Am. Act A1395: s. 5]
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) **an interim injunction or any other interim measure**.
>
> (emphasis added)

[45] As to the mode of originating process, it is clear from s. 50 AA that only an originating summons is allowed. It reads as follows:

> **50. Mode of Application**
>
> Any application to the High Court under this Act **shall be by an originating summons** as provided in the Rules of the High Court 1980 [P.U. (A) 50/1980]. (emphasis added)

[46] The rationale for prescribing that mode of originating process is that the main or underlying dispute is to be decided by the arbitral tribunal and not by the court for the simple reason that parties had agreed to refer all disputes howsoever arising out of the contract to arbitration.

[47] The High Court's limited intervention is only for the limited interim measure of granting an injunction to restrain the call on the BG if unconscionability on the part of the caller, in this case Star Media, had been

shown. As the High Court in both the originating summonses had not so found, no interim injunction was granted and the originating summonses were dismissed.

[48] Finding of fact in an interim application is not meant to bind the parties when they proceed to arbitration or litigation as the case may be. Granted that the parties may not generally resile from the positions they have taken at an interlocutory stage but they are not estopped from canvassing the full merits of their stand taken on affidavit evidence during a s. 11 AA application.

[49] Where there are conflict of affidavit evidence, the courts would generally and circumspectly refrain from deciding more than is necessary with respect to an interim measure prayed for pending the full merits of the case to be argued at the arbitration or trial as the case may be.

[50] In the celebrated House of Lords' case on interlocutory injunction in *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 at p. 510, we are reminded of Lord Diplock's sagacious and succinct observation as follows:

> It is **no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit** as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. (emphasis added)

[51] Further at p. 511 Lord Diplock explained the approach of the court on an interlocutory injunction application as follows:

> Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. *The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case.*
>
> (emphasis added)

[52] We agree with learned counsel for JRB and JIC that the High Court in determining OS 11 and OS 12 was not required to determine the merits of the underlying dispute between parties. In *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652, the High Court held that it should have regard to the following in the exercise of its discretion on whether or not to grant the interim measure, *ie*: first, the existence of a cause of action against the party whom interim relief is sought; secondly, there must be an arbitration agreement; thirdly, the relief must be interim in nature; fourthly, the interim relief must aid the proposed arbitration; and fifthly, the arbitration should be commenced within a reasonable time.

[53] Being a matter involving a BG one must also read the above factors in the context of the Federal Court's case of *Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1 where the test laid down is as follows:

> [40] After the close of submissions, we were served, on 15 December 2011, by learned counsel of *Sumatec*, an additional submission citing a recent decision of the Court of Appeal which had discussed the very question now posed to us in this appeal. MRC responded *via* its letter dated 28 December 2011. This was the case of *Kejuteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442. We have scrutinised that decision and the reasons for the findings of the learned judges in that case. We are inclined to agree wholly with the principles enunciated by the court there. The Court of Appeal agreed with Focal Asia that the principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense. We also agree with these other holdings of the Court of Appeal:
>
> *(i) In my view, consonant with the principle as laid down by my learned brother, unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract.*
>
> *(ii) In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.*
>
> (iii) A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties).
>
> *(iv) All the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.*

[41] A determination on whether unconscionability applies in a particular case would therefore depend largely on the material facts. Coincidentally, the same learned appeal judge wrote the lead judgment in *Kindenko* and in this case. The injunction was allowed in *Kindenko* and refused in this case.

[42] So, to answer the question posed to us, we say yes, unconscionability may now be raised as a distinct ground, to restrain a beneficiary under a bank guarantee or performance bond. (emphasis added)

[54] We do not read *Bumi Armada Navigation* (*supra*) as standing for the proposition that the test for an injunction to restrain a call on a BG is different from that laid down in *Sumatec Engineering* (*supra*) by the Federal Court. Otherwise a *Mareva* or for that matter an injunction to restrain call on a BG would invariably be allowed once the five requirements are met. See also *WRP Asia Pacific Sdn Bhd & Anor v. Tael Tijari Partners Ltd & Ors* [2018] 1 LNS 1073.

[55] In *Malaysian Resources Corporation Bhd v. HSBC Bank Malaysia Bhd & Ors And Another Suit* [2019] 1 LNS 1158; [2019] MLJU 813, the High Court observed as follows:

[146] That would denude a Bond of its commercial currency and efficacy and parties affected might as well insist on deduction at source from every progress claim to be paid out or a cash Bond upfront. That would be counterproductive for the construction industry as it would have the effect of stifling cashflow.

[147] I would therefore hold that the test in *Sumatec Engineering* (*supra*) as set out by the Federal Court applies whenever an injunction is applied for to restrain call on a Bond or receipt of the Bond monies irrespective of whether there is or is not an arbitration clause in the underlying contract between the parties.

[148] To hold otherwise would be to prescribe two separate tests for the same issue and problem pending two different modes of dispute resolution with or without an arbitration agreement, the former *via* arbitration and the latter *via* litigation.

[149] There is no justification for arriving at that conclusion and the words as employed in section 11(1)(a) AA are flexible enough to accommodate the same test to be applied with or without an arbitration agreement between the parties.

[56] Courts in our jurisdiction as well as in other Commonwealth countries have consciously restrained themselves from deciding on the merits of the underlying contract in what is essentially a dispute between an employer and its contractor or between parties down the chain of sub-contracting.

[57] The position in UK is as illustrated in *TTI Team Telecom International Ltd And Another v. Hutchinson 3G UK Ltd* [2003] All ER (D) 83 (Apr) where it was observed as follows:

33 ... The current approach of English courts to third party applications to restrain calls by beneficiaries on issuers under documentary credits was clearly and authoritatively stated by Morison J in *Cargill International SA And Another v. Bangladesh Sugar And Food Industries Corp* [1996] 4 All ER 563. This summary of the applicable approach was approved by the Court of Appeal in approving his decision (see [1998] 2 All ER 406). The judge stated:

> I start with the commercial purpose of a performance bond. There is a wealth of authority concerned with the question whether and in what circumstances an interlocutory injunction may be granted (1) against the bank which issued the bond to restrain it from paying in accordance with its terms, and (2) against the beneficiary of the bond to prevent it from calling the bond. The court will not grant an injunction in either case unless there has been a lack of good faith. The justification for this lies in the commercial purpose of the bond. *Such a bond is, effectively, as valuable as a promissory note and is intended to effect the 'tempo' of 'parties' obligations, in the sense that when an allegation of breach of contract is made (in good faith), the beneficiary can call on the bond and receive its value pending resolution of the contractual disputes*. He does not have to await the final determination of its rights before he receives some moneys. *On an application for an injunction, it is, therefore, not pertinent that the beneficiary may be wrong to have called the bond because, after a trial or arbitration, the breach of contract may not be established; otherwise the court would be frustrating the commercial purpose of the bond. The concept that money must be paid without question, and the rights and wrongs argued about later, is a familiar one in international trade, and substantial building contracts ...*
>
> *However, it seems to me implicit in-the nature of-a bond, and in the approach of the court to injunction applications, that, in the absence of some clear words to a different effect, when the bond is called, there will, at some stage in the future, be an 'accounting' between the parties in the sense that their rights and obligations will be finally determined at some future date*. ... As far as I am aware, and no case was cited to me to suggest otherwise, the performance bond is not intended to supplant the right to sue for damages. Indeed, such a contention would conflict with what I believe to be the commercial purpose of these instruments. ...

46.

> 2. When a third party seeks to restrain a beneficiary from calling a bond, or from receiving the product of a call, the court's starting point is that a call will ordinarily only be restrained where there has been fraud in setting up or calling the bond or where there is a lack of a breach of faith by the beneficiary in threatening a call.
>
> ...
>
> 4. In addition, where it appears that the call would be a nullity, a court will intervene to restrain that invalid call. Examples are where a condition precedent to a call has not yet been fulfilled; where the bond is a 'see to it 'bond necessitating prior proof of loss by the

> beneficiary or poor performance by the third party which has not yet been established; or where the demand or the supporting documents show that the demand does not conform to the requirements imposed by the bond for a valid demand.
>
> 5. Otherwise, a threatened call will not be restrained. In particular an allegedly incorrect calling of a performance bond will not be restrained merely because the factual basis of the call arising out of the underlying contract is disputed. *Thus, disputes as to whether a breach of contract, determination of a contract for cause, a repudiation of contract or the incurring of loss have occurred, where these are events covered by the performance guarantee, will not be allowed to found an application to restrain a call unless these disputes reveal a breach of faith by the beneficiary. Any consequent payment under the bond to the beneficiary which over-compensates the beneficiary may be recouped in the "accounting" exercise that the third party may claim in subsequent litigation against the beneficiary under the underlying contract.* (emphasis added)

[58] Thus, a finding by our High Court on why it is inclined to hold that the extended completion date was 15 February 2018 does not bind the High Court that will decide ultimately on the full merits of the parties' claims and counterclaims in the underlying disputes.

[59] The finding that the extended completion date was 15 February 2018 and as such the call on the BG is not premature or not unconscionable, is at best only a tentative finding for the limited purpose of deciding whether the call on the BG by Star Media was unconscionable. We agree with the submission of learned counsel for JRB and JIC that for *res judicata* to be applicable, there must be finality to the decision on the issue in question. We find merits in the submission that, given the interim and/or interlocutory nature of OS 11 and OS 12, there could hardly be any finality attached to the issue of completion date.

[60] The views expressed by Justice Nordin Hassan J (now FCJ) were based on affidavit evidence alone which were in conflict in material aspects. In an interlocutory application, finding of facts derived from often affidavits that are in conflict are not final and conclusive of the rights of the parties to be ventilated at the trial. Thus, in *Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors* [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435; [1988] 3 MLJ 90, it was observed as follows:

> The order of Mustapha J refusing the plaintiffs' interlocutory injunction insofar as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a *prima facie* view and lacked the element of finality since it is always open to the High Court, at the final hearing, to review that question involved and to arrive at an opposite conclusion in the light of all evidence both oral and documentary should the circumstances so required. Accordingly, the legal effect of the refusal of the interlocutory injunction was simply that, at the interlocutory stage, based on limited material then available, the plaintiffs were not entitled to the injunction relief claimed.

[61] A closer perusal of the GOJ of Justice Nordin Hassan J (now FCJ) would show that His Lordship confined his findings solely in respect of the issues concerning calling of the BGs. In fact, foremost on His Lordship's mind as stated in para. [10] of the GOJ was that it was not disputed that the two BGs are unconditional BGs, irrevocable and ought to be released upon a written demand from Star Media, the beneficiary of the BGs.

[62] It was clear that the parties were disputing on what is the correct completion date with Star Media asserting that it was on 15 February 2018 and JRB/JIC arguing that it should be 20 June 2020. The fact that parties have a genuine dispute would not elevate the dispute to unconscionable conduct.

[63] The fact that the learned High Court Judge had preferred the argument of Star Media that the completion date was on 15 February 2018 and hence the call on the BGs was not premature and hence not unconscionable, did not in the circumstances of the two originating summonses, constitute a full and final finding of fact caught by *res judicata* and issue estoppel. Thus, it is open for JRB/JIC to argue the issue of extended completion date more fully at the trial of the underlying disputes where all the facts with respect to variation works instructed by Star Media and the effect these may have on completion date and the concomitant need for a further submission and approval of the amended building plans and the impact this may have on delay – all these would assume critical importance at the trial.

[64] A finding of fact of limited utility for an interim purpose cannot be capitalised in one's favour at the full trial of the matter with respect to the underlying dispute. In an OS of this nature where the High Court had to decide on whether to grant or to dismiss an injunction to restrain the call on a BG based on affidavits alone, the considerations of the test of unconscionability and the balance of convenience rest where they belong – purely for the limited purpose of the injunction.

[65] In *Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd* [2016] 1 LNS 649; [2016] MLJU 352 it was observed as follows:

> [112] Taking into considerations all the arguments for and against the injunction, this Court is satisfied that the Plaintiff has not shown a strong prima case of unconscionable conduct on the part of the Defendant to justify a restrain on the Defendant from making a call on the BG or to receive the proceeds from the BG. *The Plaintiff's case taken at its highest would show a bona fide dispute on the termination of the Principal Subcontract that would have to go for trial. Nothing had come near to shocking the conscience or pricking it to the point of a reflex reaction of revulsion at the so-called reprehensible conduct of the Defendant*.
>
> [113] In the upshot, I had dismissed the Plaintiffs application in Enclosure 3 for an injunction to restrain the Defendant from making a call on the BG or to receive the proceeds from the BG. At any rate, damages would be more than an adequate remedy being a monetary sum that the parties

> are disputing over and that overall, the balance of convenience would tilt in favour of the Defendant. The ad-interim injunction granted was discharged. (emphasis added)

[66] His Lordship did not make any findings, nor is there any discussion in the GOJ concerning whether parties' conduct had varied the completion date, or whether Star Media had by conduct agreed to a new completion date, or whether Star Media had contributed to the postponement of completion date by its various variation orders. We agree that these issues would determine the liabilities of parties and the extent of those liabilities *ie*, the merits of the underlying dispute. However, in OS 11 and OS 12, no specific findings on these aspects were made by the Court enroute to its finding that the extended completion date was on 15 February 2018.

[67] When confronted with the same substratum of facts in Suit 374, Justice Akhtar Tahir J observed as follows:

> 29. In this case there has been no adjudication, in the manner an adjudication should be done. There has been merely an Interpretation of the clauses in the SPA during the originating summons proceedings. The matter can only be said to have been adjudicated fully if there has been a finding of the Court on the material disputed facts between the parties.
>
> 30. Without a full adjudication any judgment given cannot be said to be a final judgment and therefore both the principle of *res judicata* and estoppel are not applicable in this case.

See: High Court GOJ of Justice Akhtar Tahir J dated 18 November 2020 in Suit 374 at p. 141 ACB(J).

[68] Learned counsel for JRB and JIC also referred to the case of *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals* [2003] 4 CLJ 505; [2003] 4 MLJ 654 and to the following *dicta* which is instructive:

> When the plea of *res judicata* is raised it is necessary to identify with precision the issue that was decided in the earlier proceedings. To constitute a *res judicata*, the earlier judgment must 'necessarily and with precision' determine the point in issue: *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 (fold) followed. It was clear from the judgment in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 that the Federal Court did not at all consider on the validity of the 1992 agreements. The issue was only raised by the learned counsel for the appellant in the case in his submission before the court. The Federal Court merely held that as the administration of the deceased's estate was not completed at that point of time the beneficiaries had no title to pass to the plaintiff and as such, the plaintiff was not 'a person or body aggrieved' for the purpose of removal of the private caveat. *Res judicata* can never be applied in favour of the defendants because *res judicata* only prohibits a cause of action from being re-litigated between the same parties but in that case, the defendants were never a party. *In Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd although the defendants were a party,*

A *res judicata, whether in the narrow sense or the wider sense, cannot apply because the matter involved in the case was in respect of an interlocutory order relating to injunctions. It is trite law that for res judicata to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties or finally puts the case out of court* (see p 666E-G). (emphasis added)

B

[69] It is not uncommon sometimes in an interlocutory application for a judge in affirming or setting aside an *ex parte* injunction or an *ad interim* injunction, to perhaps make some finding of facts to justify his decision when such a finding may strictly not be necessary and indeed would be matters for decision at the trial of the action. The court then would have to distinguish between what is a mere *obiter* as opposed to the *ratio* of the decision. It is only the *ratio* that would be binding as between the parties on a subsequent court hearing the full merits of the case.

C

[70] This caution was explained by Justice Gopal Sri Ram JCA (later FCJ) in *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31, at pp. 37 to 38 as follows:

D

> Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the merits of the case appear to have been discussed. The comments in these passages are mere *obiter dicta* and do not constitute the *ratio* of the case. It is only the *ratio* of the case which is binding between the parties to a dispute or their successors ... Further, to constitute *res judicata*, "the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p. 53, necessarily and with precision" determine the point in issue. These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of *res judicata* cannot succeed.

E

F

[71] Another earlier case illustrative of the cautionary approach is that of *Florence Bailes v. Dr Ng Jit Leong* [1983] 1 LNS 7; [1983] 2 MLJ 175 at p. 179 where Ajaib J (as he then was) explained as follows:

G

> In her writ of summons the plaintiff sought a declaration that a three months' suspension imposed on her by the Penang Club was null and void and she also sought an injunction to restrain the Committee of the Penang Club from enforcing the suspension. She also claimed damages and costs.

H

> Pending the hearing of the suit the plaintiff obtained an interim order on June 8, 1981 restraining the Committee from enforcing the suspension until the trial of her suit. This order was vacated by another order of the High Court on June 25, 1981. So, the position at this stage was that the Civil Suit filed by the plaintiff remained to be heard and determined by the court.

I

> *However, in the grounds of judgment dated July 7, 1981 [1982] 1 MLJ 333) in support of vacating the interim order Arulanandom J. went deeper into the matter and made findings which appear to cover all the issues involved in the suit*. An appeal was lodged with the Federal Court by the plaintiff but as the three months period of suspension had ended the appeal was struck off on the application of counsel for the defendant. At the hearing before me on the preliminary points Mr. R. J. Manecksha for the plaintiff said from the Bar that when the Federal Court appeal was struck off the judges sitting in the Federal Court had indicated that the matter should go back to the High Court for determination of the issues involved in the Civil Suit.
>
> *I think it may not be an unreasonable inference to draw from all the facts and circumstances leading to the interim injunction and subsequently to the order vacating the interim injunction that the parties had confined themselves to the issue only of the interim injunction and not to the suit as a whole. Thus, the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. In view of all these matters it seems to me that the plea of res judicata should not prevail and that in the interest of justice there should be a full hearing of the suit itself*. For this reason too, I hold that the presiding judge who would now hear this suit is not *functus officio* and therefore not precluded from hearing the case.
>
> (emphasis added)

[72] Therefore, it must be established that the finding was a "necessary step" for the determination of the whole case or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision": see the House of Lords case of *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 at 965. This principle is succinctly set out in K R Handley in *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata* (Butterworth, 3rd edn, 1996), at para. 201:

> Even when the court has expressly determined the same issue in the earlier proceeding an issue estoppel will not necessarily result. Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot.

[73] Justice CL Wong J appreciated that Justice Nordin Hassan J (now FCJ) in OS 11 and OS 12 need not have decided on the merits of the case but that since His Lordship had made a finding that the vendor's entitlement was not completed on the extended completion date of 15 February 2018, that finding is binding on her. With respect, Her Ladyship erred when she proceeded to find as follows:

> 26. In reply, JRB contends that in OS 11 and 12 the court only decided on the unconscionability or otherwise of the call on the BG and not on the merits of the case. *I am of the view that although the court in an injunction application is not required to decide on the merits of the case and should in fact refrain from deciding the merits of the case, the High Court in this case had made a finding* that the vendor's entitlement was not completed on the extended completion date of 15 February 2018. (emphasis added)

[74] In fact, when Star Media applied for the enforcement of the undertaking arising from the delay caused to it finally obtaining the release of the sums in the BGs by the two banks, the High Court in reaffirming that the decision in OS 11 and OS 12, made no determination on the underlying disputes between the parties *vis-a-vis* whether there was any breach of the SPA when it observed as follows:

> [66] Granted that the OSs herein were initiated pursuant to section 11 of the Arbitration Act 2005 allowing parties to apply for any interim measure at the High Court. The courts at all levels had decided that in respect of the issue of the call on the Bank Guarantee, there is nothing unconscionable about it.
>
> [67] In the absence of fraud or unconscionability the demand on the Bank Guarantees must be allowed for otherwise the instrument of a Bank Guarantee would be meaningless and not worth the paper it is written on where commercial certainty is concerned.
>
> [68] *It is true that the courts did not make any decision on the underlying dispute between the parties vis-a-vis whether there was a breach of the Sale and Purchase agreement dated 19 August 2011 ("SPA"). That is because that issue is not relevant for the purpose of determining the validity of the call on the Bank Guarantee. That issue would have to be decided at the arbitration* but in the meanwhile if the plaintiff has not shown unconscionable conduct on the part of Star Media, then the demand on the Bank Guarantee is valid and the sums guaranteed would have to be released. (emphasis added)

See: Justice Lee Swee Seng's GOJ dated 19 June 2019 at pp. 68 to 69 ACB(J).

[75] Again Justice CL Wong J was spellbound to the finding of fact of Justice Nordin Hassan J (now FCJ) and felt that she was obliged to follow when she observed at para. 28 of her GOJ as follows:

> 28. Whilst I take note of the observations of Justice Lee Swee Seng, it does not detract from the fact that in his grounds of judgment in dismissing OS 11 and 12, the learned judge had in fact made an express finding that JIC had failed to deliver the vendor's entitlement to Star Media by the extended completion date of 15 February 2018. **Implicitly, the learned judge must have rejected JIC's contention that the completion date has been extended to 20 June 2020**. (emphasis added)

[76] The New Zealand Court of Appeal's case of *Joseph Lynch Land Co Ltd v. Lynch* [1995] 1 NZLR 37 gave the reasoning and rationale for the non-application of *res judicata* to what is at best a tentative finding on fact on an interlocutory application as follows:

> Issue estoppel is concerned with the prior resolution of issues rather than causes of action. In the same paragraph of Halsbury as that referred to above, it is said that issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him.
>
> ...

There is a further difficulty which stands in the way of an issue estoppel in the present case. It is clear from the authorities that the issue in respect of which the estoppel is claimed must have been determined with certainty in the earlier litigation.

...

If a plaintiff seeks an urgent interim injunction inter partes and fails, this could hardly be regarded as precluding the plaintiff from continuing to assert the rights in question and seeking trial. It would be difficult to suggest that a plaintiff in those circumstances was the subject of some sort of issue estoppel by dint of a finding that there was no arguable case on the papers then before the court: see the decision of Beaumont J in *Schlieske v. Minister For Immigration And Ethnic Affairs* (1987) 79 ALR 554, 573. T*he reason, of course, is that it would be unrealistic to expect a plaintiff seeking an urgent interim injunction to put up its whole case and a failure at that stage could hardly lead to any form of estoppel. There is, in our view, an echo of this point in the reference in Halsbury to the point at issue having to be "solemnly" determined.*

...

While we acknowledge that points decided in interlocutory proceedings may in certain circumstances lead to an estoppel, the rationale is less powerful in an interlocutory context. Therefore, the justice of the case must be compelling before a decision which is in substance interlocutory is held to prevent the later ventilation of an issue. We consider that the statement in Cross at para 12.9 (p 317) that a decision on an interlocutory matter will not suffice for an issue estoppel is too widely expressed. But the need for caution in the interlocutory field is supported by the decision of the English Court of Appeal in Bobolas v Economist Newspaper Ltd [1987] 3 All ER 121 in which the court held that rulings made and issues decided by a judge in the course of a trial where no final decision had been reached and a retrial had been ordered were not *res judicata* and were not binding at the retrial whether by way of issue estoppel or otherwise.

In our judgment the ultimate question is concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory. The question is rather whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise. (emphasis added)

[77] Learned counsel for JRB and JIC submitted with much persuasiveness that the case of *Joseph Lynch Land Co Ltd* (*supra*) supports this argument. The issue in OS 11 and OS 12 was confined only to the calling of the BGs, whether there was fraud or unconscionability on part of Star Media. Having found no element of fraud or unconscionability, the High Court refused to grant an injunction restraining the call of the BGs.

[78] We agree that in the circumstances of this case, it would be unreasonable and against the justice of the case, that JRB and JIC are precluded to have the merits of this construction dispute ventilated and determined at the trial solely because of some collateral findings made by the High Court in the interim injunction proceedings.

[79] We are of the considered view that had Her Ladyship considered the above authorities she would not have found herself in the dilemma captured in para. (d) of para. 19 of her GOJ as follows:

> (d) simply put, it is impossible for there to be two different completion dates and in holding Star Media's call on the BGs on 15 February 2018 was valid (paragraphs 12 of the Grounds of Judgment) the High Court by necessary implication must be treated as having rejected JIC's alternate Alleged New completion date on 20 June 2020;

[80] We bear in mind that the doctrine of *res judicata* has its origin in equity and is designed to achieve justice such that where its application would yield an unjust result, then it should not be applied. Reference may be made to the case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 and the House of Lords' case of *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 where at p. 109 it was held that:

> One of the purposes of estoppel being to work justice between the parties, it is open to the courts to recognise that in special circumstances inflexible application of it may have the opposite result ...

[81] With respect, we would answer question 1 in the negative in that JRB is not barred by reason of *res judicata* and/or issue estoppel from contending that the completion date for the vendor's entitlement under the SPA has been enlarged to 20 June 2020 in spite of the High Court in OS 11 and OS 12, when hearing the injunction application by JIC to restrain Star Media's call in the BGs, had made a finding of fact that the completion date fell due on 15 February 2018.

Whether There Are Multifarious Disputes Of Facts Arising From A Construction Contract Between The Parties In The SPA Such That An O. 14A ROC Application Is Eminently Unsuitable To Dispose Of The Two Suits

[82] The courts would always have to balance the need for a full trial where the parties have the opportunity to ventilate their claim and counterclaim on the one hand and those where the issues of fact and law are as clear as broad daylight such that a trial is not necessary and that the matter or a substantial part of it may be decided summarily.

[83] Order 14A r. 1 of the ROC provides as follows:

> Disposal Of Case On Point Of Law
>
> 1. Determination of questions of law or construction (O. 14A r. 1)
>
> (1) The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[84] Understandably, the disposal of a case on points of law would be most helpful when the material or relevant facts are not in dispute. Otherwise, the court would be deciding a question or point of law in a *vacuo*. Thus, the Court of Appeal in *Global Indian Education Sdn Bhd v. Neeta's Herbal International Sdn Bhd* [2016] 1 LNS 822; [2016] 6 MLJ 109 astutely observed as follows:

> [24] The law on the scope of O. 14A is well settled. *An application under O. 14A is inappropriate if there are conflicting allegations of fact. Order 14A cannot be invoked on the basis of assumed facts. The court ought not to give a ruling under O. 14A in vacuo on the basis of hypothetical facts.* In *Thein Hong Teck & Ors v. Mohd Afrizan bin Husain And Another Appeal* [2012] 2 MLJ 299 the Federal Court opined as follows:
>
> > It is trite law that O. 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2008] 2 MLJ 812). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in *vacuo* or on a hypothetical ruling, which the court will not do (see [2016] 6 MLJ 109 at 122 *State of Bank of India v Mariani Marketing* 1 March 1991, CA Transcript No 91/0304).
>
> [25] The Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 laid down some of the relevant factors which the court should consider in dealing with an application under O. 14A. As observed by the Court of Appeal:
>
> > In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O. 14A and O. 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found.
> >
> > It is my view that O. 14A gives leverage to the court to finally determine issues such as questions of law or construction which may finally be determined without the need for a full trial of the action.
> >
> > On a final note, it might be noted that the O. 14A regime is largely put in place to enable courts to effectuate speedy solutions to civil disputes where oral evidence is unnecessary.

A

> [26] Both these cases were affirmed by the Federal Court in the subsequent case of *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 5 AMR 285.

[85] See also: *Kerajaan Negeri Kelantan v. Petroliam Nasional Berhad & Other Appeals* [2014] 7 CLJ 597; [2014] 6 MLJ 31 and *Lembaga Pembangunan* B *Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273; [2015] 6 MLJ 612.

[86] The decided cases all speak with one voice that where the relevant facts are in dispute, the procedure of so determining them by way of conflict of affidavit evidence would be most inappropriate without *viva voce* evidence C where under the crucible of cross-examination, the dross may be burnt up leaving the refined truth purified as through the fire of cross-examination.

[87] Thus in *Su'ot Tebari v. Land Custody And Development Authority (LCDA) & Another Appeal* [2020] 10 CLJ 807, it was held by the Court of Appeal as follows:

D

> [35] Although the appellant had submitted at length in response to the issue of indefeasibility and limitation in his submission, we are of the view that it would not be necessary to dwell on them at this stage. At this stage, in disposing of this appeal, it is necessary for us to only deal with the pertinent issue, *ie*, whether the action was suitable to be disposed of E by way of an O. 14A application. In determining whether it is suitable to be disposed of by the same, the High Court must first determine that the relevant facts needed in arriving at the determination of the question of law posed in this case are not in dispute.
>
> [36] Here, we are constraint to say that the relevant facts are clearly in F dispute and it is not appropriate to determine the questions of law by relying on affidavit evidence alone.

[88] We find merits in the submission of learned counsel for JRB and JIC that guided by settled authorities, it is clear that an application under O. 14A is inappropriate if: first, there are conflicting allegations of facts; secondly, G the material facts are in dispute; and thirdly, factual issues are interwoven with legal issues.

[89] It is clear that a comparison between the parties' pleadings would show that there are material and serious factual disputes between parties. In Suit 258, Star Media in its statement of claim alleged that JIC committed H numerous breaches of its SPA obligations to which JRB has disputed in its defence. There are allegations which do not concern the completion date of the vendor's entitlement. These can be seen in the following:

(i) JIC had failed to comply with its SPA obligations in constructing Tower I A, including the amendment of building plan without Star Media's consent, failure to provide technical knowledge, failure to apply good

engineering and architectural practice, and failure to construct Tower A according to specifications. See: paras. 25(a) to 25(d) of Star Media's statement of claim at p. 119 ACB(P);

(ii) JIC had failed to remedy its breaches of SPA obligations in that it lacks expertise and competence in constructing Tower A, it did not complete the architectural fittings, and that it did not comply with contractual specifications under the SPA and requirements of the relevant statutes. See: paras. 38 and 39 of Star Media's statement of claim at pp. 123 to 124 ACB(P);

(iii) Star Media also pleaded particulars of construction defects allegedly caused by JIC which it had also failed to remedy those defects in Tower A. See: paras. 39(A) to 39(L) Star Media's statement of claim at pp. 124 to 126 ACB(P); and

(iv) Star Media also alleged that JRB lacked intention, took no initiative and refused to perform its SPA obligations and its refusal to remedy construction defects. See: para. 48 Star Media's statement of claim at p. 130 ACB(P).

[90] As JRB and JIC have categorically denied and disputed all the above allegations by Star Media, these material factual disputes can only be resolved after taking *viva voce* evidence through a trial. The disputes are not disputes for the sake of disputing. The contentions are not completely frivolous and are at the very least arguable.

[91] Question 2 asked the following question for the High Court to answer:

> Whether the defendant is barred by reason of *res judicata* and/or issue estoppel from contending that the delay on the completion and delivery of the vendor's entitlement is due to or caused by the plaintiff when the High Court in OS 11 and OS 12 had already determined that the plaintiff was not responsible for any delay concerning the delivery of Vacant Possession of Tower A?

[92] Where amendments to building plans are concerned, JRB had in its amended defence and counterclaim in para. (14)(b) in Suit 258 set out in details the various variations requested by Star Media which were minuted as well as the dates of the variation instructions spanning a period from 5 November 2014 to 6 January 2017 consisting of some 20 variations.

[93] It was JRB and JIC's contention that the variations in question would require fresh approval of the building plans by the local authority MBPJ to ensure compliance with the law and/or appropriate regulations. The variations listed in para. 14(b) of JRB's amended defence and counterclaim includes the following: additional room for building management, relocation of tower a control room, demolition of auditorium AV control room in the

mezzanine floor and to build a new control room, increasing coverage of external entry canopy and amendment to its design, request for larger toilet space from previous agreed layouts in serving the auditorium.

[94] Instead of submitting the variations piecemeal, JIC had submitted them after all the variations were finalised. Whether or not the variations listed totalling about 20, would have an impact of time delay would be a matter that would have to be adduced at trial for as it is, parties could not agree on what is a reasonable extension of time to complete in the light of the various variations requested for including the time when construction of Tower C was put in hold because Star Media had expressed an intention to purchase it and hence there were discussions on how that Tower may be tailored with respect to its construction to meet the requirements of Star Media. Tower C had initially been approved to be built as a residential block.

[95] Star Media's intention to purchase Tower C was communicated to JIC *via* its letter of 19 March 2013. It was only on 30 May 2013 that the project management consultant of Star Media informed JIC that Star Media would not proceed to acquire Tower C.

[96] Likewise, whether the new completion date should be three years from the date of the approval of the amended building plans arising from the variations instructed by Star Media is a matter to be determined at the trial where a proper assessment by the delay experts might assist the court in determining what is a fair and reasonable extension of time.

[97] As to whether JIC had followed the specifications for the construction of Tower A, that is a matter for trial and if the non-compliance amounts to defects, then the relevant rectification works would have to be done and if not, then the amount spent to rectify would be charged to JIC.

[98] Thus, where Star Media had alleged in para. 39 of its statement of claim that the construction of the exterior facade glazing had resulted in loss of built-up area, JRB had denied that and maintained that the construction was in accordance with the specifications of the approved plan.

[99] Interestingly, in answer to question 5 posed for Her Ladyship's decision, Justice CL Wong J had answered in the negative, in that JRB/JIC are not obligated to provide proof of compliance of s. 70(21) of the Street, Drainage and Building Act 1974 and by-law 25 of the Uniform Building By-Laws (Amendment) 2007 in the issuance of the certificate of completion and compliance under cl. 16.4 of the SPA dated 19 August 2011.

[100] There is also cl. 8.1 of the SPA where Star Media would have to elect between the sum of RM50 million being the amount called upon under the two BGs as agreed liquidated damages or to claim for damages as may be proved for any delay in completion by JIC and as guaranteed by JRB. JRB

had pleaded that there had already been overcompensation for Star Media's alleged loss as at 31 January 2018 before the call on the BGs, Star Media's claim was only RM23,495,123.29 as stated in para. 21 of its statement of claim.

[101] Clause 8.1 of the SPA reads as follows:

> In the event that the purchaser shall fail to complete and deliver to the Vendor the vendor's entitlement in accordance with the provisions of this agreement on or before the completion date or any extension thereof **the Vendor shall be entitled to the following remedies at the election of the Vendor**, in its absolute discretion:
>
> **(a) to claim under the Bank Guarantee and Corporate Guarantee;**
>
> **OR**
>
> **(b) to claim for damages from the purchaser for losses** incurred by the Vendor by reason of or caused by the default of the purchaser.
>
> (emphasis added)

[102] Admittedly, these are disputes not unusual in construction contracts. We appreciate that the net effect of Her Ladyship's decision in Suit 258 is that the entire merits of the dispute between parties arising from this construction project are determined through the few affidavits filed in OS 11 and OS 12. Respectfully, that cannot be right when facts are heavily in dispute.

[103] JRB has a counterclaim consisting of a tortious claim against Star Media that it had maliciously injured or caused to be injured JRB's business and reputation. Star Media denied these allegations in its reply. The nature of the counterclaim which involves allegation of bad faith or malicious intention to injure another company cannot be resolved without full trial. Even if JRB's claim be weak, that is no justification for a summary decision under O. 14A of the ROC.

[104] It would appear that the main question of law posed by Star Media in its O. 14A application concerns only the completion date of its entitlement referred to in the SPA as the vendor's entitlement. Even if this question is answered, the serious disputed issues are left unresolved. We agree that resolving one issue on the completion date, assuming for a moment that it can be resolved fully and finally by reading the affidavit evidence which are patently in conflict with each other, does not "finally determine the entire cause or matter" as required under O. 14A, and not even substantially. Clearly, the second limb of O. 14A was not met.

[105] Whilst construction disputes with its steep deadline of completion and proper contract management and supervision should not be over-exaggerated, we should also not over-simplify them. With the greatest of respect to Her Ladyship, by resolving all pending issues as hinging on the extended completion date of 15 February 2018, her Ladyship found only one

question posed which would require evidence to be led. See: GOJ in Suit 258 at p. 130 ACB(J). That is question 6 which Justice CL Wong J held as follows:

> 64. The determination of Question 6 is said by Star Media to be dependent upon a construction of the SPA and general construction industry practice. I am of the view that what is general construction industry practice has to be proved as a matter of fact and it is not appropriate to determine what the practice is in an Order 14 A application. Upon a construction of the SPA, I am not of the view that JIC or JRB is obliged to provide the full set of construction drawings requested by Star Media. Clause 18 of the SPA sets out the scope of works of JIC and does not state that JIC shall provide the full set of construction drawings to Star Media, whereas cl. 14.1 (c) specifically sets out the documents which JIC is obliged to forward to Star Media. I would therefore answer Question 6 in the negative.

[106] From the above, it can be discerned that Her Ladyship was unable to determine question 6 because what amounts to "general construction industry practice has to be proved as a matter of fact". The determination of that issue requires evidence by an expert witness in a trial. More importantly, without determining what is the industry practice, parties' dispute as to whether JRB and JIC have acted below the standard of the construction industry cannot be determined. It is glaringly clear that this factual dispute cannot be resolved by an O. 14A application.

[107] Perhaps the unintended consequences arising from Justice CL Wong's disposal of the matter by way of O. 14A procedure are that the issues such as whether the sum of RM50 million is the liquidated and agreed damages that Star Media can contractually claim on top of interest on late completion and whether the defects complained of by Star Media are defects that JIC is responsible for and should rectify and if so the costs of the rectification, have all faded away.

[108] The reality is that these issues have not fizzled away and it remains for JRB and JIC to argue that extended completion date is not on 15 February 2018 but on 20 June 2020. It is not just the construction of the relevant terms of the SPA but the conduct of the parties with respect to the variation works and the time impact assessment that are very much live issues besides the issue as to whether what is agreed in the BG sums is a genuine pre-estimate as to the losses arising out of the delay in completion and transfer of the title to Star Media.

[109] JRB and JIC had pleaded that Star Media had by conduct or otherwise, whether expressly or impliedly, agreed with the new completion date *ie*, 20 June 2020 calculated as it is from the three years period after the approval of the amended building plans by the local authority. We see no good reason why they should not be allowed to adduce evidence to justify such an extended completion date and if that is not the date, then the court upon

hearing evidence of the impact on time analysis arising out of the variation works may then assess what is a reasonable extension of time in the circumstances of the case.

[110] Whether the variation instructed by Star Media had enlarged the completion date and whether the parties by conduct had agreed on a new completion date are issues for mature consideration at the trial. Whether Star Media has knowledge of the submission of the newly amended building plans and approval and the delay occasioned with respect to variation works that cannot be done until the amended building plans are approved by MBPJ would be a matter for trial. These factual questions arising from the pleading remained unanswered. In allowing the O. 14A application, Her Ladyship seemed to have decided the matter *in vacuo*.

[111] Interestingly in Suit 374, when confronted with substantially the same substratum of facts in dispute, the court below had assessed the pleadings and held as follows:

> 25. To summarise, from the reading of the various the facts contained in the pleadings, it is clear that there are number of material disputed facts that can only be determined by a full Trial. A mere construction of the SPA without calling for oral evidence is insufficient to determine the actual date of completion.
>
> 26. In short the issue of completion date is far from conclusively or finally been determined by just interpreting the provisions of the SPA as was done in the hearing of the originating summons.

See: High Court GOJ of Justice Akhtar Tahir J dated 18 November 2020 in Suit 374 at p. 140 ACB(J).

[112] More importantly, these material factual issues cannot be resolved without a full trial. For example, the extent of Star Media's knowledge of the newly amended building plans and the new approval by the local authority can only be ascertained by taking *viva voce* evidence and *via* cross-examination in a trial. Clearly, even the first limb of O. 14A was not met.

[113] To further compound the problem of deciding the issues summarily, JIC had on 26 June 2020 informed Star Media of the issuance of the certificate of completion and compliance ("CCC") for Tower A on 19 June 2020. To JRB and JIC, the vendor's entitlement is deemed completed within the meaning of cl. 16.4 of the SPA. By this letter, Justice CL Wong J noted that JIC had called for a joint inspection to be conducted pursuant to cl. 4B.4 on 6 July 2020 and for the defects liability period ("DLP") under cl. 17 of the SPA to commence from 6 July 2020. See para. 39 of her GOJ.

[114] Justice CL Wong J further noted that Star Media's position is that the vendor's entitlement had not been completed because JIC had not yet transferred the issued document of title ("IDT") to Tower A to Star Media.

As these events had transpired after the filing of the O. 14A application, Star Media had posed the following additional issues of law for the determination of the High Court as follows:

(i) question 4: Whether cl. 16.4 of the SPA which provides for vendor's entitlement to be deemed completed upon issuance of CCC ought to be rejected for being inconsistent and repugnant with the specific definition and fulfilment of vendor's entitlement under the express terms of the SPA and to an overall structure or scheme and harmonious reading to the SPA as a whole? and

(ii) question 4A: Further or alternative to question 4, whether the application of cl. 16.4 of the SPA should be treated as rebuttable and/or limited to the extent needed to avoid injustice or absurdity having regard to the specific definition and fulfilment of vendor's entitlement under the express terms of the SPA and to an overall structure or scheme and harmonious reading to the SPA as a whole?

[115] We must be forgiven for not having the gumption to decide the above questions summarily without hearing the *viva voce* evidence of the parties. The heading of cl. 16 of the SPA is "Completion Of Vendor's Entitlement". Clause 16.4 of the SPA reads:

> The vendor's entitlement shall be deemed completed within the time frame stipulated in cl. 16.1 hereto UPON the issuance of the Certificate of Compliance for the vendor's entitlement.

[116] Clause 16.1 states as follows:

> The purchaser shall commence the construction of Tower A on the said Land in accordance with the approved Agreed Plans within the Tower A Construction Commencement Period.

[117] We know the word "deemed" to be a mighty powerful word for it has the ability to bring into existence even that which in reality is not there. In *Malaysian Airline System Bhd v. Competition Commission & Another Appeal* [2022] 1 CLJ 856; [2021] MLJU 2089, the Court of Appeal observed as follows:

> [111] The word "deemed" is, of course, a very powerful word. *It brings into being a factual situation which may not in reality be there. It has the effect of creating an event or situation which ordinarily and in reality, is not even there*. Lewison in *The Interpretation of Contracts* (5th Ed) at para 14.12 stated that where a deeming clause is used, it would usually be conclusive as to the deemed meaning or consequence.
>
> [112] We are familiar in cases of substituted service of summonses where the act of advertisement and posting at the last known premises of the person to be served with a legal process would be deemed served irrespective of whether the person to be served had actually seen the notice of the document served in the posting at his last known address or the advertisement in a newspaper.

[113] The person may even bring evidence to show that he could not have seen the posting as he was overseas or that he does not read or could not read the national newspaper in the language in which the notice of service was published. Whatever evidence is to the contrary would not be effective in rebutting the "deemed" facts.

[114] Thus in *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413 SC the Supreme Court considered a clause in a guarantee providing for the service of notices which contained a 'shall be deemed to be served' provision. The clause assumes critical importance because a notice of demand, necessary to found a cause of action against the guarantor, must be properly served on the guarantor.

[115] Mohamed Dzaiddin SCJ (later CJ) held that the words 'shall be deemed' in the clause meant 'shall be regarded as'. His Lordship considered the cases of *Canadian Imperial Bank of Commerce v. Haley* (1979) 100 DLR (3d) 470 and *R v. Westminster Unions Assessment Committee; ex parte Woodward & Sons* [1917] 1 KB 832 where in the circumstances of the cases, *the deeming provision was not meant to be a presumption and was therefore not something that was rebuttable. The deeming provision was conclusive as to the deemed meaning or consequence and the defendant was precluded from showing otherwise.*

[116] However, for a "deemed" clause to be triggered the conditions set for it to operate must be strictly complied with because of its inherent bias in producing a certain set result." (emphasis added)

[118] We are not unaware that the Federal Court in *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689 had cautioned against interpreting a "deemed" provision in a manner that may lead to injustice or absurdity. Justice Azahar Mohamed FJ (later CJM) observed as follows:

[48] As a starting point, the meaning of the word 'deemed' in cl. 5 of the SPA can be seen by referring to the Oxford English Dictionary (Vol 111 D-E, Reprinted 1969): Deemed, is defined as, among others, thought and supposed. According to *KJ Aiyefs Judicial Dictionary* (13th Ed), the word 'deemed' is used in various senses. Sometimes it means 'generally regarded'; at other times it signifies 'taken *prima facie* to be', while in other cases it means 'taken conclusively to be'. More importantly, the learned author also stated that the meaning to the word 'deemed' must depend upon the context in which it is used.

[49] In this context, in the case of *Lafarge (Aggregates) Ltd v Newham London Borough Council* (2005) 2 Lloyd's Rep 577, it was held that the word 'deemed' can mean 'presumed until the contrary is proved', but it can also be used as a word of definition, stating how matters are to be regarded definitively for the purposes of the contract or document in question.

[50] In *Marshall (Inspector of Taxes) v. Kerr* [1993] STC 360, Peter Gibson J in delivering the judgment of the English Court of Appeal said:

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act

A and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

...

[52] In our judgment, if something is 'deemed' in a situation *where it is clearly wrong or inappropriate, which would lead to injustice or absurdity the application of the deeming provision should be limited to the extent needed to avoid such injustice or absurdity*. (emphasis added)

[119] Whether or not an interpretation would lead to injustice or absurdity where the parties had chosen the word "deemed" to bring into existence a certain event would best be determined at the trial with respect to what is the overall scheme and structure of the SPA. It must not be forgotten that *Lucy Wong Nyuk King*'s case (*supra*) was decided after a full trial where witnesses were called and cross-examined.

[120] Justice CL Wong J however, had no hesitation in answering the question posed and resolving that the deeming provision in cl. 16.4 does not mean what it says with respect to the "vendor's entitlement" in cl. 1.1 which is deemed completed with the issuance of the CCC. Until and unless the IDT is transferred to Star Media and with vacant possession delivered, then only is the "vendor's entitlement" fulfilled as further reiterated in cl. 4.2 as follows:

The vendor's entitlement shall be satisfied by the purchaser in the following manner:

(a) by the completion of the vendor's entitlement in the manner and within the Completion Period;

(b) by the delivery of vacant possession of the Tower A free from all encumbrances whatsoever upon completion thereof;

(c) by the execution of the relevant sale and purchase agreement(s) and such other relevant instrument(s) or agreement(s) as may be necessary to transfer and convey the Issued Document of Title to the T ower A to the Vendor at the costs and expenses of the Vendor, on the basis that the purchase price for the Tower A has been fully paid, at the completion date or such other time as the Vendor may instruct. Provided That in the event the Vendor requests for a transfer of Tower A or any part thereof to third party(ies) other than the Vendor, then such costs and expenses shall be borne and paid by the said third party(ies); and

(d) by ensuring the total 900 car park bays comprising of four hundred (400) car park bays at Basement 1 and Basement 2 Levels and five hundred (500) car park bays above Level 3 of the Development are ready for renting to the Vendor at a rate which shall reflect a discount of twenty per centum (20%) from the then prevailing commercial car parking rale as may be determined by the contracted car park operator.

[121] For our part, as this interpretation of Her Ladyship would involve placing a different meaning to the ordinary and natural meaning of the word "deemed", we would defer to deciding such an issue until we have heard the witnesses and understand and appreciate for ourselves the "overall structure or scheme" of the SPA as a whole.

[122] It could well be that interest at 8% per annum of the balance purchase price would cease to run from that date of delivery of the "vendor's entitlement" for after all there is no immediate loss if by then Star Media can take vacant possession and move into Tower A. The fact that CCC had been issued would mean that generally the building had been constructed according to specification save for defects which is to be rectified during the DLP as was so held by Her Ladyship in her attempt to answer question 5.

[123] After all cl. 4.1 reads:

In lieu of the payment in cash, the purchaser shall pay the balance of the Purchase Price amounting to Ringgit Malaysia One Hundred and Thirty-Four Million Five Hundred Thousand (RM134,500,000) only (hereinafter referred to as "the Balance Purchase Price") to the Vendor by the fulfillment and satisfaction of the vendor's entitlement to the Vendor within the Completion Period and the last day of the Completion Period is hereinafter referred to as "the completion date". Notwithstanding anything herein stated, if the purchaser is unable to fulfill and satisfy the vendor's entitlement by the completion date, the Vendor shall automatically grant to the purchaser an extension of twelve (12) months from the day immediately after the completion date to fulfill and satisfy the vendor's entitlement Provided That *the purchaser shall in consideration thereof pay interest to the Vendor at the rate of eight per centum (8%) per annum calculated on the sum of Ringgit Malaysia One Hundred and Thirty Four Million Five Hundred Thousand (RM134,500,000) only from the first (1st) day of such extension to the date the vendor's entitlement is satisfied in accordance with the provisions of this agreement*. (emphasis added)

[124] Justice CL Wong J had ordered the agreed contractual rate of interest at 8% per annum on the balance purchase price of RM134.5 million until the transfer of the IDT to Tower A to Star Media free from encumbrances. Whether or not this is agreed liquidated damages or penalty in nature is a matter that could only be resolved at the trial when the "overall structure or scheme" of the SPA as a whole would hopefully have become clearer after the parties have subject themselves to cross-examination. For the moment,

A the question may be asked: if JIC has completed Tower A with CCC would it not mean that JIC had delivered to Star Media the building's worth of the balance purchase price of RM134.5 million?

[125] Her Ladyship had also awarded damages in the sum of RM50,542,117.82 being the late payment interest calculated at the rate of
B 8% per annum on the balance purchase price of RM134.5 million from 25 October 2015 to 6 July 2020. What then happens to the RM50 million released to Star Media from the call on the two BGs. Would that be set off from the above award of damages. JIC's allegation of unjust enrichment in Suit 374 on the part of Star Media is at the very least arguable and would
C be a matter that can be best answered after the trial.

[126] Under cl. 8.1 of the SPA, it would appear that Star Media had to make an election between calling on the BGs or to sue for losses arising out of the breach by JIC in failing to deliver the vendor's entitlement on or before the completion date or any extension thereof.
D

[127] The position of the law on liquidated and agreed damages clause has now been clarified by the Federal Court in *Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd* [2019] 2 CLJ 723 as follows:

E > [68] Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common-sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by
F > comparing the amount that would be payable on breach with the loss that might be sustained if indeed the breach occurred. Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.
>
G > [69] Notwithstanding the foregoing, *it must not be overlooked that s. 75 of the Act provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount*.
>
> [70] We turn now to the issue on burden of proof. The initial onus lies
H > on the party seeking to enforce a clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. *Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the*
I > *unreasonableness of the damage's clause including the sum stated therein, if any*.

> [71] If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.
>
> (emphasis added)

[128] Granted, JIC must still discharge its obligation to have the IDT transferred to Star Media and it is open to JRB/JIC to argue that such a loss if any resulting from a delay in the transfer should be proved by way of a separate assessment of damages.

[129] The more we scrutinise the issues and questions raised together with the facts vigorously contested, the more we are satisfied that the two suits must proceed to trial and cannot be summarily disposed of by way of O. 14A of the ROC.

Decision

[130] For the reasons given above, we are of the considered view that JRB's defence and counterclaim in Suit 258 should not have been struck out as obviously the legal threshold of a "plain and obvious" case has not been reached. See *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36.

[131] We had therefore allowed JRB's appeal in Appeal 1122 and set aside the decision of the High Court of Justice CL Wong J dated 7 August 2020 and remitted Suit 258 for trial in the High Court. Correspondingly and consequentially, we had dismissed Star Media's appeals in Appeals 1188 and 1453.

[132] In the light of the orders we have made, both the matters are remitted back to the respective High Courts for trial. In this case, as the issues straddle each other in the two different suits, the parties are enjoined to apply, at the appropriate time for the two suits to be heard together. Learned counsel for both the parties then indicated to us that by consent, they had agreed for the suit before Justice Akhtar Tahir J to be transferred to Justice Mohd Nazlan Ghazali J (as he then was) and so this court will accordingly direct as agreed by the parties.

[133] Costs of these appeals to be costs in the cause in the High Court.